REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1912-1913.

[HIGH COURT OF AUSTRALIA.]

MORGAN . . . . . APPELLANT;

AND

WHITE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1912.

SYDNEY, *Aug.* 1, 2, 12.

Barton and Isaacs JJ.

Bankruptcy —Certificate of discharge, objections to—Prior bankruptcy or insolvency outside New South Wales—Bankruptcy Act 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *secs.* 39, 40 (*h*), (*r*).

Sec. 40 of the *Bankruptcy Act* 1898 sets out a number of facts on proof of any one of which the Court may, under sec. 39, either refuse, or suspend the operation of, an order of discharge from bankruptcy, amongst them being :—

"(*h*) That the bankrupt has on any previous occasion been adjudged bankrupt or insolvent, ... unless his estate then produced ten shillings in the pound, or a majority in number and value of the creditors in that estate certify that in their opinion the bankruptcy or insolvency was the result of misfortune only."

"(*r*) That the bankrupt has while an uncertificated bankrupt or insolvent obtained credit to the amount of £20 or upwards from any person without having first informed such person that he was an uncertificated bankrupt or insolvent."

H. C. OF A. 1912.

MORGAN v. WHITE.

Held, that the prior adjudication of bankruptcy or insolvency referred to is an adjudication in New South Wales, and does not include an adjudication of bankruptcy in Western Australia.

Decision of the Supreme Court of New South Wales (*Simpson* C.J. in Eq.): *Re H. A. Morgan*, 12 S.R. (N.S.W.), 9, reversed.

APPEAL from the Supreme Court of New South Wales.

An application by Harry Alfred Morgan, who had been adjudged a bankrupt on 18th November 1910, for a certificate of discharge was opposed by Frederick Gilbert White, a creditor, on the grounds:—

1. That the bankrupt had on a previous occasion, to wit, in the State of Western Australia, been adjudged bankrupt and his estate did not produce ten shillings in the pound, the majority of his creditors not certifying that the bankruptcy was the result of misfortune only.

2. That the bankrupt did while an uncertificated bankrupt obtain credit to the amount of £20 and upwards to wit the sum of £500 from the above-named creditor without having first informed him that he was an uncertificated bankrupt as aforesaid.

The Registrar in Bankruptcy dismissed the objections with costs, holding that the words in sec. 40 (*h*) of the *Bankruptcy Act* 1898, "that the bankrupt has on any previous occasion been adjudged bankrupt or insolvent," and those in sec. 40 (*r*), "that the bankrupt has while an uncertificated bankrupt or insolvent obtained credit," &c., apply only to persons adjudged bankrupt or insolvent under the laws from time to time in force in respect to bankruptcy and insolvency in New South Wales, and to persons who have become bankrupt or insolvent under such laws, and have not obtained certificates of discharge thereunder.

From this decision White appealed to the Supreme Court, and the appeal was heard by *Simpson* C.J. in Eq., who allowed the appeal, and ordered the matter to be referred back to the Registrar with a declaration that the Registrar ought to take into consideration the fact of the bankruptcy in Western Australia: *Re H. A. Morgan* (1).

(1) 12 S.R. (N.S.W.), 9.

From this decision Morgan now appealed to the High Court.

Perry, for the appellant, referred to *In re Todd* (1); *Ex parte Crispin*; *In re Crispin* (2); *Colquhoun* v. *Heddon* (3); *Macleod* v. *Attorney-General for New South Wales* (4); *Cooke* v. *Charles A. Vogeler Co.* (5).

E. Milner Stephen (with him *Nicholas*), for the respondent, referred to *Ex parte Dornford*; *In re Dornford* (6); *Ex parte Salaman*; *In re Salaman* (7); *Ex parte Badcock*; *In re Badcock* (8); *In re Riley* (9); *In re Anderson* (10); *Galbraith* v. *Grimshaw* (11); *Inland Revenue Commissioners* v. *Maple & Co. (Paris) Ltd.* (12).

Cur. adv. vult.

August 12.

The following judgments were read :—

BARTON J. The appellant was declared bankrupt in November 1910, by an adjudication in this State. His estate having been wound up, he applied to the Registrar in Bankruptcy for a certificate of discharge. The Official Assignee reported (*inter alia*) that an adjudication of bankruptcy had been made against him in Western Australia in 1901, and that his estate there did not pay 10s. in the pound, that he did not there obtain a certificate of discharge nor did his creditors certify that his bankruptcy was the result of misfortune only.

The certificate application was opposed by the respondent on two grounds. One of his objections was founded on the Western Australian bankruptcy; the other was that the appellant had obtained credit from the respondent, White, to an amount exceeding £20 without having first informed the latter of the bankruptcy in Western Australia, and of the fact that he had not there obtained his certificate of discharge.

The Registrar specifically dismissed the two objections men-

(1) 27 W.N. (N.S.W.), 110.
(2) L.R. 8 Ch., 374.
(3) 25 Q.B.D., 129.
(4) (1891) A.C., 455.
(5) (1901) A.C., 102.
(6) 4 DeG. & Sm., 29.
(7) 2 Morrell, 61; 14 Q.B.D., 936.
(8) 3 Morrell, 138.
(9) 15 N.S.W.L.R. (B. & P.), 54.
(10) (1911) 1 K.B., 896.
(11) (1910) A.C., 508.
(12) (1908) A.C., 22.

H. C. OF A. 1912.

MORGAN v. WHITE.

Barton J.

tioned, and granted the certificate application, but with a suspension for twelve months grounded on conduct apart from those objections. He held that:—"The words in sec. 40 (*h*), 'that the bankrupt has on any previous occasion been adjudged bankrupt or insolvent' and in sec. 40 (*r*) 'that the bankrupt has while an uncertified bankrupt or insolvent obtained credit' &c., apply only to persons adjudged bankrupt or insolvent under the laws from time to time in force in respect to bankruptcy and insolvency in New South Wales, and to persons who have become bankrupt or insolvent under such laws and have not obtained certificates of discharge thereunder."

The respondent then appealed against the dismissal of his objections. The facts on which the two objections were based were admitted by the appellant. The respondent's appeal was upheld by *Simpson* C.J. in Eq., sitting as Judge in Bankruptcy, who referred the matter back to the Registrar with a declaration that he ought to take the fact of the previous bankruptcy into consideration. We are now to determine whether that declaration was right.

The Registrar supported his decision by reference to the principles laid down by the Privy Council in *Macleod* v. *Attorney-General for New South Wales* (1), and by the House of Lords in *Cooke* v. *Charles A. Vogeler Co.* (2).

The rule of construction adopted in both of these cases was that words of apparently general application in a Statute are taken to have been intended by the legislature to have only territorial operation. The case of *Ex parte Blain*; *In re Sawers* (3) was, together with two other cases depending on the same principle, namely, *Ex parte Crispin*; *In re Crispin* (4) and *Ex parte Pearson* (5), expressly approved by the House of Lords in *Cooke* v. *Charles A. Vogeler Co.* (2). In the first-named case *Brett* L.J. (6) thus defined the meaning of territorial operation:—"It is said that the case is literally within the words of the Statute, and so, no doubt, it is. But does it follow that, because a case is literally within the words of a Statute of any country,

(1) (1891) A.C., 455.
(2) (1901) A.C., 102.
(3) 12 Ch. D., 522.
(4) L.R. 8 Ch., 374.
(5) (1892) 2 Q.B., 263.
(6) 12 Ch. D., 522, at p. 528.

therefore it is within the jurisdiction of the Courts of that country? Certainly not. The governing principle is that all legislation is *primâ facie* territorial, that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time being bring themselves within the allegiance of the legislating power." In the same case *Cotton* L.J. said (1):—"All we have to do is to interpret an Act of Parliament which uses a general word, and we have to say how that word is to be limited, when of necessity there must be some limitation. I take it the limitation is this, that all laws of the English Parliament must be territorial—territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the Statute as regards them, come within its provisions." This rule rests on the presumption that the legislature did not intend to give its enactment an effect which would be inconsistent with international law or with the comity of nations. It is "the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English Statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. . . . It is not consistent with ordinary principles of justice or the comity of nations that the legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction": *James* L.J. in *Ex parte Blain*: *In re Sawers* (2). In the case of the Statute of a self-governing part of the Empire, the construction which limits general words to a territorial application rests on the further ground that the result of the wider construction would be that the Statute exceeded the powers of the legislature which had passed it. This appears from the judgment of the Judicial Committee in *Macleod's Case* (3).

(1) 12 Ch. D., 522, at p. 531. (2) 12 Ch. D., 522, at p 526.
(3) (1891) A.C., 455.

H. C. OF A. 1912.

MORGAN v. WHITE.

Barton J.

Now, I do not think that either of the provisions here called in question, assuming them to be really couched in general terms, would, if construed literally according to the import of those terms, be extra-territorial in application. As they stand they are, to use the words of *Cotton* L.J. (1), "territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them." The appellant is a "debtor" within the meaning of that term as used in the *Bankruptcy Act* and explained in the English cases; that is to say, he is a debtor subject to the jurisdiction of the bankruptcy law of the country or State in which he resides. Had he not been such a debtor he could not have committed the act of bankruptcy on which the adjudication was founded. It was in my judgment perfectly competent to the legislature of this State to prescribe, if it really has prescribed, that if such a debtor, made bankrupt, has at any time previously been adjudged bankrupt outside New South Wales in such circumstances as are described in the two sub-sections, the Court shall either refuse him a certificate of discharge or issue it only with a suspension or upon conditions: sec. 39, sub-sec. (4). Once there is a subject within the jurisdiction, as there was not in the cases which the Registrar has cited, it seems to me that such an express limitation upon the grant of a certificate is not in any sense open to the objection that it is extra-territorial legislation.

So far, then, I am able to agree with *Simpson* C.J. in Eq. But it does not follow—I say it with great respect—that these sub-sections, fairly interpreted, have the meaning which that learned Judge has attributed to them. It seems to me that, albeit one has dealt with the question of territoriality, one has still to consider, first, whether these provisions, if general in terms, are to be read in the widest sense; and, next, whether they are in fact general.

I will first assume, then, that the terms of the sub-section are wide enough to include all previous adjudications even if they have taken place outside New South Wales. Still, the question is whether they are intended to be included.

Now I think that, where it is the purpose and object of a Statute to deal with legal rights and legal procedure, to set up

(1) 12 Ch. D., 522, at p. 531.

tribunals and define their powers, general provisions relating to Courts or to process or to adjudications are *primâ facie* to be taken to relate to those things as they exist, or are to exist, in the State which is legislating. That is the sense which they seem to me to bear in the absence of expressions or plain implications giving them the wider meaning. Here I find no context which affixes either expressly or by inference such an extended sense to the words employed. The provisions must be construed as they stand. Assuming, then, the generality of the terms, I am of opinion that where the legislature in such an Act as this and in such a connection as the present speaks of a bankrupt who "has on any previous occasion been adjudged bankrupt or insolvent," and uses no term or phrase indicating specifically that it is referring to bankruptcies, &c., outside the State, it means such only as have occurred within the jurisdiction for which it is legislating.

But I also think that, so far from using what I may term words of extension, the legislature has in this instance rather limited the meaning by the context. Sec. 4, sub-sec. (1), specifies a number of acts of bankruptcy, and, among them, if made "in New South Wales or elsewhere," are (*a*) a conveyance in trust for the benefit of creditors generally, (*b*) an assignment, &c., with intent to defeat or delay creditors. and (*c*) a transfer or charge which would, "under this or any other Act," be void as fraudulent preference if a sequestration order were made against the debtor. So that where the legislature has intended to attach certain consequences to an act done or suffered outside New South Wales it has known how to express the intention. That design is evinced again in paragraph (*i*) of the same sub-section, by which a debtor commits an act of bankruptcy if he has been adjudged bankrupt or insolvent by a British Court of competent jurisdiction "in or out of New South Wales," and has not received a certificate of discharge or other corresponding release. This is an instance which may well be compared with paragraph (*h*) of sec. 40, since both relate to previous adjudications. The words of extension, thought necessary in the one case, are absent in the other.

But besides thinking that the words of paragraph (*h*) standing

H. C. OF A. 1912.

MORGAN v. WHITE.

Barton J.

alone are, if general, to be read in a sense limited to New South Wales, and that the Act affords a context which itself tends to limit them to that sense, I am of opinion that the words are on the face of the provision not necessarily to be read as general at all. Taking first the words "bankrupt or insolvent," although there are States in the Empire where the condition consequent on an adjudication is termed by law an insolvency and not a bankruptcy, still that was the term used in this State until the passage of the Act of 1887. At that time it is evident that there were still estates of insolvents not finally dealt with; see secs. 106 (1) and 133 (1); and their existence was ample reason why the words "or insolvent" should have been employed in both sub-sections of sec. 40, to specify local adjudications. The words "statutory composition or arrangement" describe the process provided for in Part I., Division 4, of this very Act. "Assignment for the benefit of creditors at common law" is equally applicable to such an assignment here or elsewhere within the self-governing dominions, but it is no more. Finally, the words "unless . . . a majority in number and value of the creditors in that estate" (*i.e.*, the estate previously bankrupt or insolvent) "certify that in their opinion the bankruptcy or insolvency was the result of misfortune only," cover the cases of composition or arrangement. A certificate as to misfortune is applicable to them, but is to relate to them as "bankruptcy or insolvency," showing that the sub-section includes compositions, &c., in that category. That is a correct description as to the New South Wales law, for here the proposal for a composition or arrangement cannot be made till after the sequestration order, which is the adjudication of bankruptcy; while in England and wherever else the English Act of 1883 has been adopted, it must precede the adjudication, and if adopted is not a proceeding in the bankruptcy. In point of fact it obviates a bankruptcy.

Thus the more closely this sub-section is examined the more probable it appears that it was framed in view of adjudications and other proceedings in this State only.

A consideration of sec. 39, sub-sec. (4), serves to confirm that view. The second part of it as we have seen directs the refusal, suspension or conditional grant of a discharge in cases within the

enumeration of sec. 40. But the first branch requires a refusal in all cases where the Court is satisfied that there is conduct of the bankrupt which amounts to a misdemeanour "under this Act or any amendment thereof." It would be strange if a certificate of discharge might be refused because of a prior bankruptcy in or out of New South Wales, while an actual misdemeanour would be no ground for a refusal unless it amounted to an offence under the New South Wales Act, that is to say, unless it were at least committed within the limits of that State.

An argument was based on sec. 4, sub-sec. 1 (*i*), to which I feel bound to refer. It was said that an anomaly would exist if, while an adjudication could be founded on a prior bankruptcy out of New South Wales, a certificate of discharge could not be refused or suspended on the express ground of such a bankruptcy. I do not think there is any anomaly. The proposition for the respondent amounts to this, that a prior extraneous failure is, where there is no certificate regarding it, to be a ground of adjudication, and also, even where there is a certificate (see sub-sec. (*h*)), to be available as a bar to discharge, and certainly the cause of suspension or conditions. If this is to happen even where the conduct of the bankrupt after the domestic adjudication has been blameless, and even where he has since paid all his debts in full, the law of this State will be draconic indeed.

I do not deal separately with sub-sec. (*r*) because its construction was throughout treated, I think rightly, as depending on that of sub-sec. (*h*).

For these reasons I am of opinion that the appeal ought to be allowed, the order appealed from discharged with costs, and the order of the Registrar restored.

The respondent must pay the costs of this appeal.

ISAACS J. The appellant was adjudicated bankrupt in New South Wales in 1910. He had in 1901 been adjudicated bankrupt in Western Australia. The single question is whether the Western Australian adjudication comes within sub-sec. (*h*) of sec. 40 of the *Bankruptcy Act* 1898. In my opinion it clearly does not. The sub-section begins in this way: "That the bankrupt has on any previous occasion been adjudged bankrupt or insol-

H. C. OF A. 1912.

MORGAN v. WHITE.

Isaacs J.

vent and" &c. Now the words "on any previous occasion" indicate to my mind that the legislature contemplated some previous proceeding under the laws of New South Wales relating to bankruptcy and insolvency. The words "previous occasion" are most inappropriate to designate some judicial action by a foreign Court, say in America, or some composition under a law of Canada, or a voluntary assignment in Calcutta.

The sense in which the legislature has employed the expression is evident from a consideration of the whole Division 8, headed "Bankrupt's certificate." Sec. 39 provides that, whether a composition or scheme of arrangement has been approved or not, the debtor may give notice of his intention to apply for a certificate of discharge under the Act; and that, when he applies, the Court shall refuse the discharge in certain cases, and shall on proof of any of the facts mentioned in sec. 40 adopt one of the several specified courses. Reading that with the words in sub-sec. (*h*) of sec. 40 that the bankrupt has on "any previous occasion been adjudged bankrupt or insolvent, or made a statutory composition or arrangement with his creditors," it is perfectly plain to me that some prior occasion, referable to the provisions of the bankruptcy laws of New South Wales, was contemplated. Under the Act of 1887 this remained clear, because confined to bankruptcy pure and simple, and to bankruptcy qualified by statutory composition. In 1896, by Act No. 19, sec. 14, "bankruptcy" was made to include "insolvency," the words "statutory composition or arrangement" were declared to include "an assignment for the benefit of creditors at common law."

But that did not alter the meaning of the phrase "any previous occasion." "Insolvency" was added because provisions still stood, and even now exist (see secs. 106 and 133 of the Act of 1898), relating to "insolvency," and common law assignments have a distinct recognition in the same Act by way of both registration and protection. See secs. 4 (10), 6 (*d*) proviso, and 58.

The words "previous occasion" consequently denote on the face of the Act that the given occasion is not the first when the bankrupt has had to invoke the aid of the law of New South Wales to free himself from his debts and obligations otherwise than by payment in full in the ordinary course, but by one or

other of the methods prescribed. This has always been part of the bankruptcy practice: see *Ex parte Hollingworth* (1). The remainder of sub-sec. 4, when we inquire how it is to be worked out practically and effectively, supports this view. The first qualification is "unless his estate then produced ten shillings in the pound."

Observe the standard. The money standard, though, if no other difficulty presented itself, it is capable of being read as equivalent to fifty per cent., is nevertheless one primarily inapplicable to countries having a different currency—even Canada, and so some limitation is *primâ facie* necessary. The second qualification is more serious. It is "unless a majority in number and value of the creditors in that estate certify that in their opinion the bankruptcy or insolvency was the result of misfortune only." "Certify" means to the Court, and it is hardly possible that creditors in a bankruptcy outside the jurisdiction and anywhere in the world, say in Scotland or Vancouver or even Western Australia or New Zealand, were contemplated as joining in a certificate to the Court of New South Wales as to the misfortune of the debtor. What "creditors" must certify? Is it all the creditors proving or does it include those who do not; does it include creditors whether secured or not; does it indeed mean only creditors in the ordinary sense, or does it include creditors in an enlarged bankruptcy sense, as claimants for unliquidated damages (see *Ex parte Wilmot* (2))? Then what means would the Court have of verifying any of the facts in such a certificate, the facts of actual creditorship, of number, of value, of identity, and *bona fides* of the certificate?

Why not a certificate of the foreign Court or some official, if comity is the object, which would be, moreover, a much more definite and reliable certificate? Obviously, the precaution as construed by the respondent would, in the case of most countries, prove expensive, impracticable, and in fact illusory, because the Court could not have any real opportunity of assuring itself whether the qualification was satisfied or not. Further, suppose both those qualifications absent, the Court yet has to inform its mind as to what action it ought to take in respect of the

(1) 4 DeG. & S., 44, at p. 48. (2) L.R. 2 Ch., 795.

H. C. OF A. 1912.

MORGAN v WHITE.

Isaacs J.

particular bankruptcy. How is the objecting creditor to satisfy the Court which of the possible alternative orders is the just one in the circumstances? In the case of Western Australia it would be easier than if it were New Zealand, and still easier than if it were Canada, and the United States, but the difference between trouble, uncertainty and cost in that case, and the facility, comparative certainty, and inexpensiveness with which the Court could inspect its own records and deal with a matter where insolvency is the subject matter of inquiry, or make inquiries as to local compositions and assignments, constitutes a strong reason for adhering to the local limitation. How is the Court to enter upon an examination of the circumstances of an English, Irish, Scotch or foreign bankruptcy, or a New Zealand composition, or a Jamaican assignment, so as to do justice to all concerned? So far, then, as a practical examination of the words of the section can elucidate the matter, they do not by any means support the construction given to them by the respondent.

Now there are other considerations which may legitimately be called in aid either to strengthen or to weaken that primary construction. One is the way in which the legislature refers to some proceedings and matters outside New South Wales.

Sec. 3 defines "property" as including all property "whether situate in New South Wales or elsewhere."

Sec. 4 in sub-secs. (*a*), (*b*), and (*c*) contains the words "in New South Wales or elsewhere" with reference to conveyances or assignments. Sub-sec. (*i*) makes it an act of bankruptcy if the debtor has been adjudged bankrupt or insolvent by a British Court of competent jurisdiction "in or out of New South Wales." From these it appears that Parliament when it intended to include matters outside New South Wales took pains to say so. Another is the purview of the other sub-sections in sec. 40. Certainly in most of them their operation is confined to this State, and in all of them—leaving aside for the moment the present case—it is so substantially. For, though incidentally transactions and events occurring beyond New South Wales may require consideration as relevant circumstances, such as the sale of goods elsewhere by the commercial travellers of a Sydney firm, or the disposal in another State of goods forwarded from this State—yet the clear contem-

plation of the section is that they must be connected with or related to the debtor's affairs as carried on in New South Wales. The general aspect of the enactment is not thereby altered, and so the respondent derives no help from the doctrine *noscitur a sociis*.

Another relevant consideration, having an important bearing on the situation is the well-known doctrine that legislation is primarily territorial as Lord *Halsbury* L.C., said in *Cooke* v. *Charles A. Vogeler Co.* (1). The meaning of the doctrine is that unless the language of a Statute by express words or necessary implication indicates the contrary, the persons, property, and events in respect of which Parliament has legislated are presumed to be limited to those in the territory over which it has jurisdiction and for the welfare of which it exercises that jurisdiction. Now, the jurisdiction of the Imperial Parliament in the eye of a British Court extends to all persons on British territory whether foreigners or not, and to all British subjects whoever they may be; and in a British Court the meaning of an Imperial Act will be understood accordingly: *R.* v. *Earl Russell* (2). But the jurisdiction of the State Parliament does not extend to any person whatever his nationality outside the State territory—though of course it may affect any property within it wherever the owner may be. And the meaning of a State Statute must be understood accordingly: *Macleod* v. *Attorney-General for New South Wales* (3). The Parliament of New South Wales has very clearly recognized the force of the presumption and provided for it, by expressly extending, in the instances I have mentioned, the area applicable to the locality of property, conveyances and assignments, and judicial proceedings. A distinction which bears strongly on the interpretation is drawn by the learned primary Judge and this requires careful examination. He says that the refusal of a certificate of discharge is not a punishment. Now, where an Act of Parliament says that a man shall be deprived of his normal status as an ordinary citizen, and shall not only be deprived of his property, but placed under personal control, the further provisions which forbid his release from that artificial condition of subjection are of the same nature as those under

(1) (1901) A.C., 102, at p. 107. (2) (1901) A.C., 446.
(3) (1891) A.C., 455.

H. C. OF A. 1912.

MORGAN v. WHITE.

Isaacs J.

which he is at first reduced to it. They are at least a continuation of the process and may be, as here, an independent means of extending the disability, that is of prolonging the restraint of natural liberty. It is not at all analogous to a prisoner seeking release before he has served his sentence. Here the Act provides (secs. 34 to 36) that after a composition scheme or arrangement has been accepted and approved, the bankrupt may get his estate released, and in any case, where the creditors get paid in full or give a legal release of their debts, the estate may be released, with an exception where criminal proceedings are pending or contemplated. And the order releasing the estate from sequestration at once revests in the bankrupt all his remaining property as if there had been no sequestration.

But he still remains a bankrupt and requires a personal discharge. He has then a *primâ facie* right to his discharge, because the assigned causes of his bankrupt status are ended. The legislature, however, following a well-trodden path, has wisely provided for the future security of the community by permitting an inquiry into the conduct of the bankrupt and, if he is found to have so behaved as to constitute his freedom to trade a danger to his fellow citizens, that freedom may be refused.

Sec. 39, sub-sec. (4), directs the Court to refuse the discharge absolutely if he has in its opinion committed a misdemeanour under the *Bankruptcy Act* or any amendment thereof. It is to be here noted that, if the Parliament of New South Wales intended to have regard to the simple fact of a bankruptcy or a composition or assignment in another State as constituting a possible peril to the people of New South Wales, it is remarkable that it did not include a criminal offence against the bankruptcy laws of other States, which is much more heinous than mere bankruptcy.

Then the sub-section proceeds to give the Court jurisdiction to regulate its action as to certain "facts" not amounting to criminal offences, but considered as elements of more or less importance to the public in relation to the bankrupt's competency to trade.

Those facts enable the Court in appropriate cases to graduate its severity from absolute refusal to a conditional order of discharge. It may perpetuate or prolong the deprivation of his

normal freedom, or may attach onerous conditions to its restoration.

It is not like a Court, which has granted some privilege or authority, withdrawing or suspending it, but it is the refusal, for proved collateral misconduct, charged against him by the opposing party, to grant a restoration to natural civil status after the immediate cause of its loss has been obliterated.

That has the main characteristics of a penal enactment, and so the corresponding provisions of English legislation have been regarded, as reference to a few decided cases can show.

In *Ex parte Hodgson* (1) a bankrupt appealed because the Commissioner gave him only a third-class certificate with a condition as to after-acquired property. *Turner* L.J. said (2) :—"I feel no doubt that some punishment is deserved by this bankrupt; the question is, what extent of punishment will satisfy justice."

In *Ex parte Salaman*; *In re Salaman* (3) *Brett* M.R., although he points out the matter charged was not criminal or morally wrong, observed that the bankrupt was "guilty of most rash and hazardous speculation," and that the "sentence passed" by the Registrar was not too severe, but too lenient. *Baggallay* L.J. (4) says "the punishment which has been inflicted is not excessive." *Lindley* L.J., (5) while observing that "no penal consequence results to the bankrupt," meaning, as he immediately adds, that "no misdemeanour is created by the section," concludes by saying "as to the amount of punishment which shall be inflicted, we cannot interfere with the exercise of the Registrar's discretion." In *In re Huggins*; *Ex parte Huggins* (6) *Cave* J., speaking for himself and *Charles* J., said of the section, that "it is a quasi-penal enactment," and that the case be remitted to the County Court Judge so that "he may pass what he deems to be the proper sentence under the circumstances."

In re Cook (7), before *Field* and *Cave* JJ., is a very instructive case. The objections were omission to keep books, trading after knowledge of insolvency, and contracting debts without reasonable ground of expectation of being able to pay. *Field* J.

(1) 3 De G. M. & G., 547.
(2) 3 De G. M. & G., 547, at p. 554.
(3) 14 Q.B.D., 936, at p. 946.
(4) 14 Q.B.D., 936, at p. 948.
(5) 14 Q.B.D., 936, at p. 949.
(6) 22 Q.B.D., 277, at p. 278; 6 Morr., 38.
(7) 6 Morr., 224; 61 L.T., 335.

H. C. OF A. 1912.

MORGAN v. WHITE.

Isaacs J.

(1) spoke of them as "charges of offences," and said "the Court had to judge whether or not the bankrupt is a man fit to be trusted again with the carrying on of trade." It is obvious an adverse judgment on that point is a severe punishment. There is no practical difference between putting a man into a cage, and preventing him from getting out. In *In re Jenkins* (2) rash and hazardous speculation was spoken of by *Cave* J. as "an offence of which this man has been guilty." And at p. 43 he said it would be "sufficiently punished by the suspension of the discharge for three years." *Vaughan-Williams* J. agreed. In *In re Tobias & Co.*; *Ex parte H. A. Tobias* (3) the same two Judges sat—and again the refusal of the discharge is spoken of as (4) "a punishment on the bankrupt"—on that ground it was held that a new application might be made because "there can be no reason why the punishment should not be remitted at any distance of time, if it can be shown that the object of the punishment has been effected."

If, then, the legislature, carefully observing the necessity of indicating clearly when they intend to affect the status originally of any person in respect of events occurring outside the territory, wished to continue to affect that status by independent foreign events, although the first had been exhausted, it is highly improbable that another course—an indirect and unexpected course—would have been adopted. I think it altogether inherently unlikely that the Parliament of New South Wales intended, without distinctly saying so, to create a possible bar *in perpetuum* against resumption of citizenship and freedom from personal control by reason of some act done outside the jurisdiction, at any prior distance of time, and when the debtor owed no allegiance to this State, and was then under no obligation to conform to its special standards of right and wrong. And this inherent improbability is borne out by the fact that, notwithstanding all other conditions for instituting bankruptcy proceedings are fulfilled, no creditor is entitled to present a petition unless (see sec. 6 (*d*)) the debtor is domiciled in New South Wales, or, within a year before, has ordinarily resided, or had a dwelling house or place of business, in New South Wales.

(1) 6 Morr., 224, at p. 234.
(2) 8 Morr., 36, at p. 42; 39 W.R., 430.
(3) (1891) 1 Q.B., 463.
(4) (1891) 1 Q.B., 463, at p. 465.

The learned primary Judge thought that ignoring the Western Australian bankruptcy would be contrary to the comity of nations. But it would not be more so than if the adjudication were in Russia or Brazil; and, on the other hand, the position put proves too much. Suppose the Western Australian Court had granted a certificate of discharge and so re-admitted the debtor as a non-dangerous member of society. Clearly the New South Wales Court is not bound to accept that as final, and, if not, a contrary decision would be as great a departure from the comity of nations as any that is suggested. The whole difficulty is avoided by recollecting that the New South Wales Parliament is protecting its people from dangers arising from nonconformity with its own standards of commercial conduct; these are standards that can be recognized, and known; can be tested and enforced on the spot, and, after all, are the only ones material to the object sought to be attained.

One further observation is necessary. There is a good reason for making a debtor domiciled here bankrupt, if, being such debtor, he has permitted himself to be made bankrupt elsewhere in the British dominions. His trustee abroad might claim and gather in his property here (see *Galbraith* v. *Grimshaw* (1) and *In re Anderson* (2)), and the legislature may have thought it desirable to protect creditors in New South Wales in such an event by making the foreign bankruptcy an act of bankruptcy with relation back. This constitutes a vital difference between the purpose of that provision and the object of sec. 40.

For the reasons stated I am of opinion the appeal should be allowed, and the Registrar's order restored.

Appeal allowed. Order appealed from discharged with costs. Order of Registrar restored. Respondent to pay the costs of the appeal.

Solicitors, for the appellant, *A. J. Taylor & Greenwell.*
Solicitors, for the respondent, *Stephen, Jaques & Stephen.*

B. L.

(1) (1910) A.C., 508.
(2) (1911) 1 K.B., 896.